Supreme Court, U.S.
FILED

03 728 NOV 15 2003

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SALLY DIVILLY – PETITIONER

VS.

PORT AUTHORITY OF ALLEGHENY COUNTY – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

Whether the lower court violated Ms. Divilly's due process rights under the First and Fourteenth Amendments to the United States Constitution by reversing the grant of a new trial by the trial court.

LIST OF PARTIES

Sally Divilly (Petitioner)

Port Authority of Allegheny County (Respondent)

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT 13
CONCLUSION 14

INDEX TO APPENDICES

APPENDIX A Decision of the Supreme Court of Pennsylvania Western District Denying Application for Reconsideration

APPENDIX B Decision of the Supreme Court of Pennsylvania Western District Denying Petition for Allowance of Appeal

APPENDIX C Decision of the Commonwealth Court of Pennsylvania Reversing Decision of Court of Common Pleas of Allegheny County

TABLE OF AUTHORITIES CITED

CASE NAME:		PAGE NO.:
1.	Duggan v. Niglio, 436, Pa. 22, 258 A.2d 501 (1969)	5, 6
2.	Gougher v. Hansler, 388 Pa. 160, 130 A.2d 150 (1957)	8
3.	Houseknect v. Walters, 590 A.2d 20 (Pa. Super. 1991)	8
4.	Kruczkowska v. Winter, 2000 Pa. Super. 393, 764 A.2d 627 (2000)	9, 10, 11
5.	Lenik Condemnation Case, 404 Pa. 257, 172 A.2d 316 (1961)	6
6.	Martin v. Evans, FORC, 551 Pa. 496, 711 A.2d 458 (1998)	7
7.	Martin v. Sloblotney, 296 Pa. Super. 145, 442 A.2d 700 (1982)	11
8.	Pachesky v. Getz, 353 Pa. Super. 505, 510 A.2d 776 (1986)	6

STATUTES:	
Pa. R.C.P. 212.1 and 212.2	12

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania Western District to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the Commonwealth of Pennsylvania decided my case was November 19, 2002. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: June 26, 2003 and a copy of the order denying rehearing appears at Appendix B.

A timely application for reconsideration was thereafter denied on August 19, 2003, and a copy of the order denying the application appears at Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The core element of the Due Process Clause of the Fourth Amendment is the concept that process used by the courts must be fair. By denying Ms. Divilly the right to a new trial as originally granted by the Trial Judge denies her the fairness guaranteed by the United States Constitution.

The Trial Judge was the one who hear the evidence and was in the best position to decide whether the verdict was "shocking." To deny him that decision without reason was to deny him the fairness required by the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Trial Judge was the one who heard the evidence and was in the best position to decide whether the verdict was "shocking." To deny him that decision without reason was to deny him the fairness required by the Fourteenth Amendment to the United States Constitution.

The present case was tried before the Honorable Timothy Patrick O'Reilly in September, 2001. The appellee claimed debilitating and permanent injuries to her back and feet as a result of being thrown from her seat while riding a Port Authority bus. This accident occurred on September 9, 1996. The appellee alleged she had to undergo years of treatment and had to cease working at her job as a waitress at the Pittsburgh Hilton Hotel per instructions from her doctor. (R.R. pp. 1A-9A) She held this position for over 30 years prior to her injuries. (R.R. p. 67A)

Both parties agree there was a bus accident on September 9, 1996. Both parties also agree the bus driver of the bus in question struck a "New Jersey barrier." Finally, both parties agree that the appellee, Sally Divilly, was a passenger on this bus. However, at trial, the Port Authority disputed how the accident occurred and the nature and extent of Ms. Divilly's injuries.

According to Ms. Divilly, she was a paying customer sitting on a side seat of a Port Authority bus, said seat being parallel to the direction of the bus. (R.R. pp. 80A-89A) Ms Divilly testified the bus was traveling at a high rate of speed and struck the New Jersey barrier while turning out of a circle known as the "West End Circle." (R.R. p. 89A) Port Authority disputed this rendition of the facts, stating that the driver was confronted with a "sudden emergency" which caused him to swerve into the New Jersey barrier. (Appellant Brief, p. 10) The nature of

this emergency was that an unknown car allegedly swerved into the driver's lane, leaving the bus driver no choice but to evade this vehicle. (Appellant Brief, p. 10)

However, Port Authority's version of events at trial was squarely at odds with what the bus driver told the investigating officer at the scene of the accident a few minutes after the impact. Samuel Guarino, the bus driver at the time of the accident, told the investigating officer who arrived at the scene of the accident that he brushed up against the New Jersey barrier. (R.R. p. 154A) Mr. Guarino also admitted that he never mentioned the oncoming car to the investigating officer. (R.R. p. 180A) The investigating officer stated that the diagram he drew made no mention of this unknown car, and he wrote up the accident as a one car accident based upon what he was told by Mr. Guarino. (R.R. p. 156A) In fact, the driver told his superiors that he misjudged the turned and turned too short, which caused him to strike the barrier. (R.R. p. 185A) He stated this to his superiors on the date of the accident.

Finally, the appellee admitted into evidence, without objection, pictures of the accident scene which clearly showed a concrete barrier between the two oncoming lanes of traffic, which further impeached the bus driver's recollection of an oncoming car. (R.R. pp. 81A-84A)

In reviewing the judge's decision to grant a new trial, Pennsylvania courts recognize this decision is within the sound discretion of the trial court, it will not be reversed absent an abuse of discretion or error of law which controlled the outcome of the case. Duggan v. Niglio, 436, Pa. 22, 258 A.2d 501 (1969). In fact, where a judge grants a new trial based on the "weight of the evidence," the Supreme Court recognized:

> "One of the least assailable reasons for granting a new trial is the court's conviction that a verdict was against the weight of the evidence and that new process was dictated by the interest of

justice ... only a palpable abuse of discretion will cause us to overturn a court's action (granting a new trial).

Duggan, 258 A.2d at 502 *quoting* Lenik Condemnation Case, (404 Pa. 257, 172 A.2d 316 (1961). An abuse of discretion only occurs if a law is overridden or misapplied or the judgment exercised is manifestly unreasonable as shown by the evidence or the record. Pachesky v. Getz, 353 Pa. Super. 505, 510 A.2d 776 (1986).

Therefore since Judge O'Reilly's Memorandum and Order grants a new trial based on the weight of the evidence, the Port Authority can request that the Court reverse the lower trial court only if the Court finds a palpable abuse of discretion in Judge O'Reilly's ruling. Appellee believes that not only is Judge O'Reilly's Opinion granting a new trial not an abuse of discretion, but any reasonable reading or interpretation of the facts shows the jury's verdict to be improbable and at variance with the facts, and should "shock the conscious of the Court." (R.R. p. 290A)

The appellant challenges the trial court's determination for a new trial based on two grounds. First as to liability, the appellant argues that the facts presented a mere conflict of testimony between the plaintiff's version and their version, and therefore the trial court's decision to grant a new trial was in error. Second, appellant contends that the jury was free to hold that the appellee's injuries were not caused by this accident since the jury was free to disbelieve the appellee's medical expert. (Appellee's Brief, pp. 12-13.) Therefore, the lower trial court abused its discretion in granting a new trial. Both of these contentions are in error.

A. LIABILITY:

As to liability, appellant seeks to reduce the testimony in this case that there was indeed a "phantom car" at the time of the accident to a mere conflict of

testimony between the plaintiff's version of events and the defendant's. However, ample facts exist in this case to support Judge O'Reilly's opinion that the "phantom car" story was highly dubious at best.

The only evidence that said car existed was provided by the bus driver, Samuel Guarino. Mr. Guarino had no recollection of the make or model of the car and could not describe it at all. (R.R. p. 182A) Furthermore, he was shown photographs of the accident scene which clearly presents a concrete barrier between the lanes of oncoming traffic, making another car in his lane improbable or impossible. (R.R. p. 183A)

Most importantly, the driver was clearly impeached by his own prior statements of how this accident occurred, which were given much closer in time to the accident in question. He told the investigating officer at the scene he thought he hit a curb, but instead hit a New Jersey barrier. (R.R. p. 180A) He also told his own superiors on the day of the accident the he "misjudged a turn and turned his bus too short, which made him contact the New Jersey barrier." (R.R. p. 195A) At no time did he ever mention a car crossing into his lane at the accident scene or during the times he first reported the accident to his superiors.

Although appellee agrees with the appellant that conflicts in testimony are usually for the jury, Martin v. Evans, FORC, 551 Pa. 496, 711 A.2d 458 (1998), this case presents more than a mere conflict of testimony. The bus driver's version of events at trial are challenged not only by the plaintiff, but by the investigating officer, the physical evidence of the scene of the accident, as well as prior admissions by the bus driver himself. If this was the case of just who was more believable, the bus driver or the plaintiff, the appellant's claim that this was a "conflict in testimony" would be correct. However, this is not the case in the present matter. Appellant's sole evidence of this "phantom car" consisted of the impeached testimony of the bus driver.

In Houseknect v. Walters, 590 A.2d 20 (Pa. Super. 1991), the appellate court upheld the trial court's grant of a new trial where the driver's characterization of the accident was inconsistent with the evidence. The appellate court held that although the credibility of witnesses is usually for the jury, where a trial court is satisfied that the jury based their decision on "incredible" or "unbelievable" evidence, a new trial must be granted. Walters, 590 A. 2d at 22. One of the elements court found persuasive in the Walters case was that the driver told the investigating officer at the scene a completely different story than the version he gave at trial. Id. at 21. Therefore, the Appellate Court stated that ample evidence existed to support trial court's decision to grant a new trial based on the driver's lack of credibility. Id. at 21.

Furthermore, prior inconsistent statements of a party are not only impeachment evidence as to credibility, but are admitted as substantive proof of the matter contained therein, i.e., the driver misjudged the turn and hit the barrier. See Gougher v. Hansler, 388 Pa. 160, 130 A.2d 150 (1957). Prior inconsistent statements which are used as admissions may be properly used to support a finding of fact. Gougher, 130 A.2d at 152.

Therefore, Port Authority admitted, through the prior inconsistent statements of their driver, that there simply was no "phantom car" on the date of the accident. For the jury to believe an impeached driver over the Plaintiff, the investigating officer, the physical evidence and the prior statements of the driver was "incredible" and "wholly unbelievable" and therefore required the Trial Court to award a new trial. Id. at 152.

In relying on the above-referenced facts in the present case, there was ample basis to support Judge O'Reilly's conclusion that the Port Authority driver's version of events was not credible. There is no abuse of discretion in Judge O'Reilly's decision to grant a new trial as to liability.

B. PROXIMATE CAUSE:

The second argument the Port Authority makes is that it was error for the trial court to conclude that the plaintiff suffered some injury in this accident. (Appellant's Brief, p. 13.) Their argument is based on citation to the plaintiff's medical expert's trial deposition where they attacked the plaintiff's medical expert's qualifications, credibility and diagnosis (Appellant's Brief, p. 13.)

Appellant's argument is a rehash of their closing statement and it misses a key point. Regardless of whether or not a jury believes Dr. Estonillo (plaintiff's expert), independent evidence existed which defendant either admitted, or did not challenge, which conclusively showed that the plaintiff suffered at least some injuries in this bus accident.

Pennsylvania courts recognized that where liability is present and there is uncontradicted evidence that a plaintiff suffered some injuries as a result of the accident, it is error for the jury to find in favor of the defendant. Kruczkowska v. Winter, 2000 Pa. Super. 393, 764 A.2d 627 (2000). In Kruczkowska, a plaintiff was awarded a new trial where the plaintiff's foot was run over by the defendant. The jury found for the defendant despite independent evidence showing that an accident did occur. The plaintiff was taken to an emergency room and given ice packs immediately after the accident. Kruczkowska, 764 A.2d at 628. Plaintiff's medical expert testified that plaintiff suffered back sprains and strains and suffered contusions because of the accident. Id. at 628. Defendant did not call an expert to dispute plaintiff's medical expert, and argued the jury was free to disregard the plaintiff's expert testimony in its entirety. Id. at 629. The appellate court rejected the defendant's analysis and granted the plaintiff a new trial on the grounds that a jury cannot ignore an obvious injury, especially where the defense counsel conceded the existence of an injury. Id. at 629. Although the defendant did not call a medical expert, the court held that merely attacking the doctor's

credibility on cross does not call into question whether the plaintiff was injured, it just calls into question the doctor's credentials. Id. at 629. Moreover, the defendant did admit that the plaintiff suffered some injury in his closing statement. The defense counsel stated "no question she had injury, okay? She was hit. She hurt her ankle. No question about it." Id. at 629. Regardless of how vigorously the defendant crossed plaintiff's medical expert, the defendant did admit that at least some minor injury occurred from the bike accident. Id. at 629.

The instant case is eerily similar to Kruczkowska. The plaintiff presented herself, two friends, her brother and a medical expert to testify as to the nature and extent of the plaintiff's injuries. They further testified that the plaintiff had no pain complaints prior to the accident and all her pain complaints did not start until after the bus accident in 1996. The Port Authority only challenged the plaintiff and her medical expert. They never offered a medical expert of their own to refute the plaintiff's medical expert's testimony.

Appellent's Brief goes into great detail about the various admissions they allegedly obtained from Dr. Estonillo relating to his credibility, qualifications and treatment of the appellee (Appellant's Brief, pp. 13-14.) However, as the trial court correctly points out, there were other factors which showed that the appellee suffered some injury in the accident (R.R. p. 289A)

Although appellee states the objective medical tests which were taken of the appellee were normal (Appellant's Brief, p. 14), said tests would not detect soft tissue injuries. Furthermore, appellant admitted the accident occurred and that Sally Divilly had to be transported to a hospital by ambulance from the accident scene. (R.R. p. 227A) Port Authority's counsel stated in his opening argument:

> "There is absolutely no question about that. We had no dispute about that. She went to Allegheny General Hospital, was treated

and released. She saw Dr. Donaldson who treated her and said she was going to be okay." (R.R. p. 59A) (emphasis added).

Under any reasonable interpretation of the defense's position, they admit an accident occurred, the appellee was in said accident, and that she had to go to the hospital from the accident scene, and was treated at the hospital and with Dr. Donaldson prior to her treatment with Dr. Estonillo. Regardless of Dr. Estonillo's testimony, Port Authority admits that Ms. Divilly suffered at least some injury at the scene of the accident. Defense counsel, in their closing, stated:

> "One, this not negligence, Sam wasn't negligent when he swerved out of the way of that oncoming vehicle, and that's number one; and number two, even if you were to believe that he is negligent, there is not substantial factor to link that negligence to a totally disabled person five years later." (R.R. 61A)

Although appellant is correct that a jury may discount any testimony, even an uncontradicted expert, Martin v. Sloblotney, 296 Pa. Super. 145, 442 A.2d 700 (1982), they may not ignore an obvious injury. Kruczkowska, 764 A.2d at 629.

Regardless of whether or not the jury believes all, some or none of the appellee's expert's testimony, they still admitted she suffered some injuries at the scene of the accident. The Port Authority only questions the nature and extent of her injuries in their argument and cross examination of the appellee and her medical expert. They never submitted the argument to the jury that the plaintiff was never hurt at all from this accident. They only question how this accident caused a "totally disabled person five years late." (R.R. p. 61A)

Since the defendant conceded some injury occurred at the scene, and there was no evidence submitted of a prior cause to her injuries, and given the other witnesses' testimony that the bus accident was the trigger of appellee's pain complaints, it was not an abuse of discretion for the trial court to rule that there

was no real dispute that the appellee at least suffered some type of injury as a result of this bus accident. (R.R. p. 290A)

Finally, the appellant argues the trial court improperly excluded evidence of a subsequent claim made for personal injuries of the plaintiff/appellee. (Appellant's Brief, p. 16) This argument is improperly raised and should be discarded. Appellant did not object to the exclusion of this evidence. Furthermore, the trial court barred it because the Port Authority only noticed the witness on the day of trial and admitted they just learned about the information the morning of the trial. (R.R. p. 194A) The trial court properly denied its admissibility as prejudicial, late, and the admission of this evidence was against Pennsylvania Rules of Civil Procedure. (Pa. R.C.P. 212.1 and 212.2)

REASONS FOR GRANTING THE PETITION

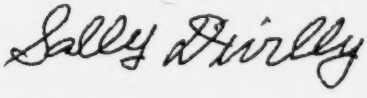
The Trial Court's Order granting a new trial should be affirmed. There is ample facts and evidence presented at trial to form the basis of the Trial Court's decision granting a new trial. The Trial Court's decision to grant a new trial in this matter was not an abuse of discretion.

The core element of the Due Process Clause of the fourth Amendment is the concept that process used by the courts must be fair. By denying Ms. Divilly the right to a new trial as originally granted by the Trial Judge denies her the fairness guaranteed by the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 15, 2003

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SALLY DIVILLY,	:	No. 697 WAL 2002
Petitioner	:	Petition for Allowance of Appeal
	:	from the Order of the
v.	:	Commonwealth Court
	:	
PORT AUTHORITY OF	:	
ALLEGHENY COUNTY,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 19th day of August, 2003, the Application for Reconsideration is DENIED.

A True Copy Patricia Nicola
As of: August 20, 2003
Attest: /s/ Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SALLY DIVILLY,	:	No. 697 WAL 2002
Petitioner	:	Petition for Allowance of Appeal
	:	from the Order of the
V.	:	Commonwealth Court
	:	
PORT AUTHORITY OF	:	
ALLEGHENY COUNTY,	:	
Respondent	:	

ORDER

PER CURIAM:

AND NOW, this 26th day of June, 2003, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy Patricia Nicola
As of: June 26, 2003
Attest: /s/ Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sally Divilly	:	
	:	
v.	:	No. 545 C.D. 2002
	:	Argued: October 7, 2002
Port Authority of Allegheny County,	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENEE L. COHN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION

BY SENIOR JUDGE FLAHERTY FILED: November 19, 2002

The Port Authority of Allegheny County (Authority) appeals from a decision of the Court of Common Pleas of Allegheny County (trial court) which granted the Motion for Post-Trial Relief filed by Sally Divilly (Divilly) and ordered that a new trial be held after a jury returned a verdict in favor of the Authority. We reverse.

Divilly was a passenger on an Authority bus that was involved in a traffic accident. Divilly sued the Authority for injuries she allegedly sustained during that accident. During the trial, Divilly testified that on September 9, 1996, she boarded an Authority bus. Divilly was sitting in the center of the bus facing the middle door and a metal pole was located in front of her. As the bus was making a right turn around the West End Circle on Steuben Street, it came. into contact

with a "Jersey barrier".[1] The impact shook the bus and caused Divilly's head to move backward and hit the window and then move forward and hit the metal pole in front of her. Divilly stated that the bus was going faster than usual when this incident occurred. The bus driver continued driving and eventually stopped the bus near the Gateway View Plaza on West Carson Street and reported the accident. The Sheriff's Department and several ambulances responded and Divilly was taken to Allegheny General Hospital. At the hospital a doctor told Divilly that she sustained a concussion and then sent her home by taxi that night. As a result of this incident, Divilly suffers from pain in her neck, back and feet and is unable to continue performing her job as a waitress, which she has held for approximately thirty years. Since the accident, Divilly has been treating with Rodrigo M. Estonilo, M.D. (N.T. 9/6-10/01, pp. 55-81).

Dr. Estonilo, a neurosurgeon, testified by videotape deposition. In October of 1996, he began treating Divilly for pain related to the September 9, 1996 incident. Dr. Estonilo opined that Divilly suffered from degenerative changes in the discs of her cervical spine before the accident but that this condition was asymptomatic, or dormant. However, this condition was exacerbated and caused to be symptomatic by the September 9, 1996 incident. Because of the pain that Divilly experiences as a result of this condition, Dr. Estonilo concluded that she is not capable of working. On cross examination, Dr. Estonilo admitted that objective tests performed on Divilly at Allegheny General Hospital after the accident, including an X-ray, a flexion and extension X-ray of the neck and a CT scan were

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[1] A Jersey barrier is "[a] protective concrete barrier used as a highway divider and a means of preventing access to a prohibited area" that was first used on the New Jersey Turnpike. The American Heritage Dictionary of the English Language (4th ed. 2000).

all negative and that there was no evidence of foot trauma.

The bus driver, Samuel Guarino, also testified. On the day of the accident, Mr. Guarino was driving a "flexible" bus, which has a long wheelbase and which requires longer turns. Because it has a long wheelbase, the back end does not follow as quickly when making a turn. Even though the bus is called flexible, Mr. Guarino explained that the bus "doesn't bend in the middle, it is not like a tractor-trailer. So you have to take it out without going over into the oncoming lane. Then you bring it around because you have to miss whatever could be on your right side to the rear." (N.T. 9/6-10/01, p. 154). Mr. Guarino explained that when he started to make the right turn around the West End Circle, "there was a car over the line. My front end, which is square, it is completely squared off, it is not rounded, it is square, it is in my lane, but it is maxed. I am near my side of that lane ... With these cars coming over, one over the line I had to - there is no time to think. There is two choices here. I either get the bus out of the way or I am going to make contact with this vehicle." (N.T. 9/6-10/01, pp. 154-155). Mr. Guarino testified that this oncoming vehicle was a couple of feet over the yellow line. To avoid this vehicle, Mr. Guarino cut the bus to the right and, in doing so, the front of the bus "cleared everything with no problem, but the rear end of the bus made contact with the jersey barrier." (N.T. 9/6-10/O1, pp. 155-156). If he hadn't moved to the right, Mr. Guarino surmised that he would have collided with this vehicle. Mr. Guarino testified that making contact with the Jersey barrier was "much like grazing a curb going around a bend of the sidewalk in a bus. The motion of the bus was just a rocking motion ..." (N.T. 9/6-10/01, pp. 156). Mr. Guarino estimated that he was going between twenty and twenty-five miles per hour at this time. After this occurred, Mr. Guarino looked in the mirror and asked the passengers if they were all right. Some passengers indicated that they were not all right and Mr. Guarino pulled into a parking lot and called the Authority which in turn called paramedics and the Sheriffs department.

James Hensell was the detective for the Sheriffs office who arrived at the scene of the accident. Mr. Guarino does not remember telling Detective Hensell about the oncoming car. However, on the report that Mr. Guarino filled out for the Authority on the day of the accident, he described the accident as "Proceed inbound in the West End Circle approaching Carson Street ramp, oncoming traffic was close, and I turned flexible bus short and contacted the jersey barrier." (N.T. 9/6-10/01, p. 159).

On cross-examination, Mr. Guarino was questioned as to why he did not tell Detective Hensell about the oncoming car. Mr. Guarino replied that "I don't recall what my state of mind was at the time. I was starting to get concerned." (N.T. 9/6-10/01, p. 162). Mr. Guarino also related that he could not recall any details about the oncoming car. Mr. Guarino further testified that his route foreman arrived at the accident scene and that he could not recall whether he told him about the oncoming car, although he acknowledged that the route foreman's report does not mention an oncoming car. Mr. Guarino explained than "[t]hese guys showed up and started asking me questions and I started talking. I am very concerned about what is going on here and a little upset about what is going on ... people started to say that they are hurt. Now people are starting to say that they are hurt and it is going to concern you." (N.T. 9/6-10/01, p. 176-177). Mr. Guarino was also asked "how this car could have been so close to your bus when you have [a traffic] island and an untraveled portion of the highway there?" Mr. Guarino responded that "[b]ecause people travel up there and they do whatever it is that they want to do to get to where they have to go." (N.T. 9/6-10/01, p.:163). Mr. Guanino was also asked: "And there is a large area separating your lane of travel from the lane of travel that this so-called phantom vehicle that you didn't get any information about, isn't it?" Mr. Guarino answered: "According to that picture, yes ... But it doesn't depict the traffic flow, sir, and how people drive." (N. T. 9/6-10/01, p. 164).

Detective Hensell testified that the damage to the bus was "[v]ery minimal. It was a rubber molding that went dowp the right side rear." (N.T. 9/6-10/01, p. 132). Detective Hensell stated that he interviewed Mr. Guarino and the passengers and then prepared a report, which states: "Bus operator stated that he came around the bend, he thought that he bumped a curb, but he brushed against a jersey barrier." (N.T. 9/6-10/01, p. 136). His report does not indicate that there was an oncoming vehicle when the accident occurred, nor could he recall Mr. Guarino mentioning an oncoming vehicle. However, Detective Hensell stated that he did not have a lengthy conversation with Mr. Guarino and never asked him why he cut the turn short.

At the conclusion of the trial, the trial Judge instructed the jury that "[i]f you find that the Defendant has proven that it was confronted with a sudden emergency not of its own making, you must determine whether the Defendant's [response] to that emergency was reasonable under the circumstances. If you find that the response was reasonable, if you find that the sudden emergency did exist, your verdict must be for the Defendant." (N.T. 9/6-10/01, p. 245). The trial Judge also instructed the jury with regard to the burden of proof in civil cases and informed them that they have the power to evaluate the credibility of witnesses.

On September 10, 2001, the jury returned a verdict in favor of the Authority. On September 18, 2001, Divilly filed a Motion for Post Trial Relief arguing that the verdict in favor of the Authority was against the weight of the evidence and that, for this reason, a new trial should be granted. On February 13, 2001, the trial Judge issued a Memorandum and Order stating that:

> It is axiomatic that statements made "closer in time" to the incident in question are inherently more reliable. There is no time for premeditation and design that would otherwise make such statements unreliable or not accurate. At the time of the trial, some 5 years after the accident, the PAT driver testified 'that the incident

> occurred due to a vehicle approaching his bus in his lane. If that were the reason, then it would be common sense to immediately report that fact to the investigator on the scene, who was the Deputy Sheriff, and to his route foreman who arrived shortly after the incident, as well as to specifically document that in his report ... prepared later that day. However, the PAT driver did not. (N.T.pp. 161-163). Instead, the PAT driver testified that on the day of the accident, he did not tell the Deputy Sheriff, nor his route supervisor, and even testified that his report, written by him on the date of the incident upon his return to the garage, says "(P)roceed inbound in West End Circle approaching Carson Street ramp, oncoming traffic was close, and I turned flexible bus short and contacted the jersey barrier." (N. T. p. 159). At no time immediately after the incident does the PAT driver mention an on-coming vehicle approaching in his bus lane. The on-coming vehicle account only arrives on the scene as a "phantom" vehicle at the time of his deposition, some 4 years later! (N.T. pp. 159-160).[2]

(February 13, 2002 Memorandum and Order, p. 5) (emphasis omitted). Additionally, the trial Judge found it significant that Divilly had no medical problems prior to the date of the traffic accident. Accordingly, the trial Judge held that "[c]onsidering the testimony of the PAT driver, as noted above ... and the uncontradicted evidence that Divilly suffered injuries as a result of the accident, I find that the jury's verdict was improbable and at variance with the facts ... and being mindful that it is often difficult to establish that a jury's verdict

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[2] This case was initially arbitrated and Mr. Guarino's testimony was taken by deposition for the purposes of the arbitration proceedings four years after the accident.

"shock's the court's sense of justice", I am convinced that in this particular case, the jury's verdict is "shocking" based on my analysis. Accordingly, I find the verdict to be against the weight of the evidence, and on this basis, I will grant Divilly's motion for a new trial." (February 13, 2002 Memorandum and Order, pp. 6-7) (emphasis omitted). This appeal followed.

Although the trial court stated that it decided to grant a new trial based on the testimony of the bus driver, Mr. Guarino, and the uncontradicted medical evidence, the trial court also mentioned that the jury's verdict shocked its sense of justice. When a trial court grants a new trial in the name of "justice", our scope of review is broad, in that we must examine the entire record to determine whether any reason, even if not mentioned by the trial court, merits the granting of a new trial. The trial court's decision will only be reversed if it has abused its discretion in granting a new trial. See Coker v. S.M. Flickinger Co., Inc., 533 Pa. 441, 448, 625 A.2d 1181, 1185 (1993). "[W]hen viewed in terms of the degree of scrutiny that should be applied, an inquiry into an abuse of discretion is operationally equivalent as one into the merit of the trial court's decision." Id. "Where the record adequately supports the trial court's reasons and factual basis, the court did not abuse its discretion. However, if the record discloses that evidence was merely conflicting, then the new trial order would have to be reversed. This is because in that situation, the trial court invaded the province of the jury." Id. at 453, 625 A.2d 1187. (citations omitted).

With regard to whether Divilly actually suffered any injuries, Dr. Estonilo did testify that Divilly suffers from injuries as a result of the September 9, 1996 incident and the Authority did not present any medical evidence to contradict this testimony. However, on cross-examination, Dr. Estonilo did admit that the objective tests performed on Divilly after the incident were negative. The jury, as the fact-finder, was certainly entitled to disbelieve both the testimony of both Divilly and Dr. Estonilo regarding whether Divilly was actually injured. Of

course, it is impossible to know whether or not the jury believed the testimony of Dr. Estonilo because, if the jury believed the testimony of Mr. Guarino, whether or not Divilly was actually injured would be irrelevant for the following reason: If Mr. Guarino did actually encounter a sudden emergency, i.e., the oncoming car, the Authority would not be liable for her injuries because of the sudden emergency doctrine. In Cunningham v. Byers, 732 A.2d 655 (Pa. Super. 1999), our Superior Court summarized this doctrine as follows:

> The sudden emergency doctrine provides a defense in a negligence action to a driver of a motor vehicle who suddenly and unexpectantly finds himself confronted with a perilous situation that permits no opportunity to assess the danger and respond appropriately. Elder v. Orluck, 334 Pa. Super. 329, 483 A.2d 474, 487 (1984), affirmed, 511 Pa. 402, 515 A.2d 517 (1986). Situations which may constitute a sudden emergency include a dust cloud, a moving object, a sudden blocking of the road, the sudden swerving of another vehicle, blinding lights and a dense patch of fog. Dickens, at 517; Levey v. DeNardo, 555 Pa. 514, 725 A.2d 733 (1999) Our Supreme Court recently reiterated the purpose of this doctrine stating:
>
> [A] person confronted with a sudden and unforeseeable occurrence, because of the shortness of time to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence. It is important to recognize, however, that a person cannot avail himself of the protection of this doctrine if that person was himself driving carelessly or recklessly.

Id. at 657-658.

After reviewing the facts of this case, it is clear that Mr. Guarino did not mention the oncoming vehicle to Detective Hensell or his supervisor. However, Mr. Guarino testified that he was in a different state of mind after the accident

because he was concerned about the passengers that indicated they were injured. Further, Detective Hennessy himself acknowledges that he did not have a lengthy conversation with Mr. Guarino after the incident and never asked him why he cut the turn short. Additionally, Mr. Guarino did note in his report, which was prepared the day of the incident, that the "oncoming traffic was close." Although the fact that Mr. Guarino did not testify as to this oncoming vehicle until four years later in a deposition justifiably may give rise to a great deal of skepticism on the part of the trial judge, it is of no consequence, as this was the first time he was asked, on the record, about the events surrounding the incident that occurred on September 9, 1996 and, further, the trial court did not declare Mr. Guarino's testimony incredible and unworthy of belief. Therefore, there was evidence that, if believed by the jury, would prove that Mr. Guarino did encounter a sudden emergency that caused him to strike the Jersey barrier and that, for this reason, Divilly's injuries were not caused by any negligence of Mr. Guarnino. Because the evidence in this case with regard to whether Mr. Guarino actually turned to miss an oncoming vehicle to avoid an accident was merely conflicting, the trial court invaded the province of the jury in granting a new trial. Furthermore, after examining the record, we can find no other reason why justice would require a new trial in this matter.

Accordingly, the order of the trial court is reversed.

/s/ Flaherty, J.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sally Divilly	:	
	:	
v.	:	No. 545 C.D. 2002
	:	Argued: October 7, 2002
Port Authority of Allegheny County,	:	
Appellant	:	

ORDER

AND NOW, November 19, 2002 , the order of the Court of Common Pleas of Allegheny County docketed at No. GD98-2814 and dated February 13, 2002 is hereby REVERSED.

/s/ Flaherty, J.

JIM FLAHERTY, Senior Judge

Certified from the Record
November 19, 2002
And Order Exit